

STATE OF MICHIGAN
COURT OF APPEALS

DAVID CALLAHAN, MICHAEL PARKER,
and ROBERT LAVERGNE,

UNPUBLISHED
June 29, 1999

Plaintiffs-Counter Defendants-
Appellants,

v

No. 209779
Branch Circuit Court
LC No. 96-011660 CL

STATE OF MICHIGAN
DEPARTMENT OF CORRECTIONS,

Defendant-Counter Plaintiff-Appellee.

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On appeal, an order granting or denying summary disposition is reviewed de novo. A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except with regard to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Giving the benefit of reasonable doubt to the nonmovant, the trial court must determine whether a record might be developed that would leave open an issue upon which reasonable minds might differ. *Moore v First Security Casualty Co*, 224 Mich App 370, 375; 568 NW2d 841 (1997).

I

Plaintiffs first argue that the trial court erred in granting defendant's motion for summary disposition on their unlawful retaliation claim. To establish a prima facie case of unlawful retaliation under the Civil Rights Act (CRA), MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, a plaintiff must show that (1) he engaged in a protected activity; (2) this was known by the defendant; (3) the defendant took an employment action adverse to the plaintiff; and (4) there was a causal connection between the

protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

The trial court found that plaintiffs failed to establish that they engaged in a protected activity. Plaintiffs assert that they did present evidence that they engaged in protected activities. First, evidence was presented that plaintiff Parker complained about a racially derogatory comment made by a coworker. In addition, evidence was presented that plaintiffs Callahan and LaVergne participated as witnesses in an investigation of the incident. Finally, evidence was presented that Callahan disciplined the coworker. However, after reviewing the record, we conclude that the trial court correctly found that plaintiffs failed to demonstrate that they engaged in a protected activity.

LaVergne testified at his deposition that he was not present during the conversation in which the racially derogatory remarks were made. Accordingly, he could not have served as a witness in the investigation of the event.

The record establishes that Callahan was present at the incident. However, the record also shows that Callahan, who was then a supervisor, failed to take any action after the racially derogatory comment was made until after the assistant deputy warden received a complaint from Parker and defendant directed him to reprimand the coworker. Thus, the record does not establish that Callahan actually opposed a violation of the CRA. Callahan argues that his eventual enforcement of the CRA with regard to the coworker's racial harassment constitutes a protected activity; however, he has failed to cite any authority for the proposition that issuing a written reprimand to a subordinate constitutes activity protected under the CRA.

Parker submitted evidence that a coworker directed a racial remark at him, and he filed an internal memo regarding the incident to the assistant deputy warden. However, this complaint does not constitute an activity protected by the CRA because Parker's allegation is not that his employer engaged in an unlawful employment practice, but rather that a fellow employee acted in a racially offensive manner. Cf. *Booker v Brown & Williamson Tobacco Co, Inc*, 879 F2d 1304, 1313 (CA 6, 1989).

Thus, plaintiffs have not presented evidence from which a factfinder could conclude that they participated in a proceeding brought pursuant to the CRA or opposed a violation of the CRA. See MCL 37.2701; MSA 3.548(701). Because the record does not support plaintiffs' claim that they engaged in a protected activity under the CRA, they failed to state a prima facie case of unlawful retaliation. See *DeFlaviis, supra*. Accordingly, the trial court did not err in granting defendant's motion for summary disposition on plaintiffs' unlawful retaliation claim.

II

Next, plaintiff Parker claims that defendant violated the Family and Medical Leave Act (FMLA), 29 USC 2601 *et seq.*, by failing to maintain his dental and vision benefits during the time he was on medical leave. We disagree.

The FMLA allows qualified employees to take up to twelve work weeks of unpaid leave per year while their group health benefits are maintained. See 29 USC 2612(a)(1), 2614(c)(1).

Parker relies on 29 CFR 825.700, which states that “[a]n employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA.” Parker argues that employees therefore should not lose fringe benefits when they take advantage of the FMLA. However, 29 CFR 825.700 does not state that the FMLA requires employers to maintain benefits beyond group health plans when employees take leave pursuant to the act.

Defendant provided evidence that vision and dental care benefits are not incorporated in its group health plans, but rather are separate, self-funded, and self-insured plans. At his deposition, Parker testified that he had assumed that because he used a single Blue Cross card for his health, vision, and dental benefits, the benefits were all under one plan. Parker conceded that it was possible that the benefits were under separate plans even though he used the same card for all three. Considering this testimony, we conclude that Parker has not established the existence of a genuine issue of material fact regarding whether vision and dental care benefits are included in defendant’s group health plans. Accordingly, the trial court did not err in granting defendant’s motion for summary disposition on this claim.

III

Finally, plaintiffs contend that the trial court erred in denying their motion for reconsideration. This Court reviews a trial court’s decision on a motion for reconsideration for an abuse of discretion. See *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997).

While the instant action was pending, the Michigan Department of Civil Service was conducting hearings on grievances filed by plaintiffs Callahan and Parker against defendant. The grievance proceedings resulted in a November 24, 1997, decision in favor of Callahan and Parker. Plaintiffs argue that, pursuant to the doctrine of collateral estoppel, the findings of the hearing officer are binding in the present case.

We conclude that the doctrine of collateral estoppel is not applicable here. First, the hearing officer issued his decision *after* the trial court order granting defendant’s motion for summary disposition was entered on November 17, 1997. Accordingly, there was no binding determination from previous litigation at the time the trial court ruled in the instant case. See *Dearborn Heights School Dist No 7 v Wayne Co MEA/NEA*, 233 Mich App 120, 124; 592 NW2d 408 (1998). Second, the hearing officer did not find that plaintiffs engaged in protected activity under the CRA and were subsequently subjected to unlawful retaliation. Rather, the hearing officer concluded that the evidence was insufficient to establish that Callahan and Parker violated certain work rules or engaged in sexual harassment in an incident that occurred more than six months after the racially derogatory comments were made. Thus, the same issue was not addressed in both actions. See *Eaton Co Bd of Rd Comm’rs v Schultz*, 205 Mich App 371, 376-377; 521 NW2d 847 (1994). For these reasons, collateral estoppel does not apply. Under the

circumstances, the trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage